

(1) Whether claimant's bilateral carpal tunnel arose out of and in the course of her employment with the respondent, State of Kansas, while claimant was involved in a return to work program sponsored by the State of Kansas.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board makes the following findings of facts and conclusions of law:

(1) Claimant met with personal injury by accident arising out of and in the course of her employment with the State of Kansas while involved in a return to work program run by the State Self-Insurance Fund.

Claimant, a Mental Retardation Technician I with the State of Kansas, suffered an injury to her back on November 30, 1992, while lifting a patient out of a bath tub. As a result of this low back injury claimant was prohibited from returning to work as a Mental Retardation Technician I. She did participate in a return to work program sponsored by the State of Kansas Self-Insurance Fund and supervised by Mr. Michael Feekin, an employee of the State Self-Insurance Fund. The goal of the program was to rehabilitate the claimant to a different job within the State. She spent two weeks filling out resumes and doing significant writing, followed by two weeks of practice on typewriters, computers, word processors, key punches and calculators. This was a five day a week program with three hours a day the first two weeks and anywhere from one to two hours per day during the last two weeks.

Claimant experienced no difficulties with this return to work program during the first two weeks of the training program. During the third week of the program claimant experienced some problems with her hands and arms but during the weekend between the third and fourth week her hands improved somewhat. Upon returning to the training program the final week, claimant's hands became significantly worse. She suffered a significant increase in pain with periodic episodes of numbness. When filling out the September 29, 1993, evaluation, claimant noted she had experienced a lot of strain on her arms and hands during the training. The program ended September 30, 1993.

On October 2, 1993, claimant was diagnosed as having viral spinal meningitis and was hospitalized under the care of Dr. Wade B. Welch. While hospitalized the claimant advised Dr. Welch of her ongoing hand problems. He prescribed medication, wrist splints, and performed an EMG which substantiated a diagnosis of bilateral carpal tunnel syndrome. Dr. Welch recommended surgical intervention. The respondent submitted evidence indicating claimant's contact with the word processor, computer and keyboard were very limited over the last two weeks and would not have comprised sufficient physical activity to cause or aggravate bilateral carpal tunnel syndrome. Dr. Welch, while not commenting on the actual cause of the carpal tunnel syndrome, did opine in his medical records that typing would be likely to make carpal tunnel symptoms worse.

Claimant was examined by Dr. Edward J. Prostic on January 11, 1994. Dr. Prostic diagnosed bilateral carpal tunnel and opined the condition developed during the course of vocational rehabilitation in the summer of 1993 caused by the overuse of claimant's wrists. Dr. Prostic supported Dr. Welch's recommendation of surgical decompression of the median nerve bilaterally.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof

shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 (1991).

The phrase "out of" the employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" the employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" the employment relates to the time, place and circumstances under which the accident occurred and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The uncontradicted medical evidence in this case indicates that claimant, while involved in a return to work training program, developed bilateral carpal tunnel.

The respondent State Self-Insurance Fund argues the modification of the definition of injury under K.S.A. 44-508(e), wherein the Legislature excluded the normal aging process or normal activities of day to day living, indicates a legislative intent to eliminate upper extremity microtrauma injuries from the workers compensation arena. The State Self-Insurance Fund argues further that any repetitive injuries suffered as a result of normal activities of day to day living of which work is a major part should be excluded from compensation. In support of its contention the State Self-Insurance Fund cites House Bill 2354, wherein the legislative proposal, if adopted, would have eliminated a portion of the definition of personal injury which discusses when the physical structure of the body "gives way under the stress of the worker's usual labor."

It is a well-defined rule of statutory construction that when the Legislature amends certain provisions of a statute it is presumed the Legislature intended to change the law in existence prior to the amendment. Gorup v. Kansas Public Employees Retirement System, 3 Kan. App. 2d 676, 600 P.2d 1161 (1979). It is also a well-established rule of

statutory construction that the Legislature does not intend to enact useless or meaningless legislation. City of Olathe v. Board of Zoning Appeals, 10 Kan. App. 2d 218, 696 P.2d 409 (1985). In this instance the State Self-Insurance Fund's argument defeats itself. The Legislature considered eliminating the language "gives way under the stress of the worker's usual labor" from K.S.A. 44-508(e), but rejected this offered statutory modification. By leaving in this specific language the Legislature has sent a clear signal that upper extremity microtraumas continue to be compensable under the Kansas Workers Compensation Act.

The Appeals Board sees the Legislature's goal in this regard to be more a codification of the Supreme Court decision in Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972). In Boeckmann, the claimant, suffering a preexisting crippling arthritis alleged this arthritic condition was aggravated by his employment at Goodyear. The Supreme Court in rejecting this contention found no evidence relating the origin of claimant's disability to on-the-job trauma, as the condition existed before claimant entered into his duties at the respondent's place of business. The Court further found that the degenerative process would continue to progress long after the claimant's retirement. In Boeckmann, the Court found that the movement which caused an aggravation to the claimant's condition was no different on the job than the claimant experienced off the job. The Appeals Board believes the Legislature intended, when offering Senate Bill 307 to exclude injuries which are the result of the natural aging process or the normal activities of day to day living, and not upper extremity microtraumas occurring as a result of repetitive activities at work.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer date January 27, 1994, is affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

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